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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAVID NORKIN

Plaintiff

-against-

DLA PIPER RUDNICK GRAY CARY LLP

Defendant.

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Civil Action No. 05 Civ. 9137(DC)

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER

Plaintiff David Norkin's opposition to transfer is notable less for what it says than for what it fails to say. Norkin, for example, says nothing about the legal principles applicable to a motion to transfer under 28 U.S.C. § 1412. Thus, he does not dispute that his choice of a New York forum is completely negated by his earlier choice to file his related bankruptcy in Connecticut (as well as by the transfer of the related Britestarr bankruptcy to Connecticut). See Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.), 896 F.2d 1384, 1391 (2d Cir. 1990); Official Committee of Asbestos Claimants v. Heyman, 306 B.R. 746, 750 (S.D.N.Y. 2004).

Similarly, Norkin does not dispute that a Connecticut forum is as convenient to him, and to every other witness thus far identified, as a New York forum. Nor does he dispute that if the case proceeds in Connecticut, he will have the same ability to compel the attendance of witnesses and the production of documents that he currently has in New York.[1]

In the same vein, Norkin does not dispute that he has, and has long had, access to the voluminous quantity of documents, depositions, and other discovery that the parties have amassed in the related Britestarr litigation in Connecticut. Indeed, as an exhibit to his opposition, Norkin has attached a copy of a document that, judging from the bates-stamp, he received from Britestarr or its counsel in the Britestarr case.[2]

Norkin does not even mention his joint prosecution agreement with Britestarr's Connecticut counsel, in which Britestarr's counsel agreed to underwrite Norkin's case against Piper in exchange for Norkin's "cooperation" and a percentage of Norkin's recovery. Through his conspicuous silence on that important point, Norkin evades any discussion of the many questionable entanglements between his case against Piper and Britestarr's Connecticut case against Piper.

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[1] Because of the ease with which a party can issue subpoenas from federal courts throughout the United States (see Fed. R. Civ. P. 45(a)(3)), it will actually be simpler for Norkin to compel the attendance of witnesses and the production of documents if the case proceeds in federal court, whether in New York or Connecticut, than if it proceeds in his chosen forum.

[2] The document is bates-labeled with the prefix "OPP," which designates "Oak Point Properties," a Britestarr affiliate. Because the document is a copy of a court filing, Norkin certainly had the ability to obtain it (if he knew of it) from the court itself, but the bates-stamp shows that he obtained it from Britestarr instead. In fact, given that Norkin and Britestarr have agreed to invest in each other's lawsuits and to work behind the scenes to prosecute their related claims against Piper, the Court may infer that Britestarr informed Norkin of the filing, provided him with a copy of it, and told him what argument to make with it.

Rather than address any of the specific, relevant factors under § 1412, Norkin emphasizes the case's connections with New York. See Opposition at 1-2. In the process, he fails to recognize that his own complaint involves the legal advice that he claims to have received concerning litigation in the bankruptcy case that he voluntarily filed in Connecticut. See Complaint, ¶¶ 15-19. He also fails to recognize that the connections with New York have little weight in a dispute concerning whether the Court should transfer the case a mere 51 miles to the bankruptcy court in Bridgeport,[3] where Norkin's bankruptcy case and Britestarr's bankruptcy case are both pending.

Norkin complains that because his complaint predates the transfer of Britestarr's bankruptcy case to Connecticut, Piper has not explained why "'the locus of operative facts'" has shifted from New York rather than Connecticut. See Opposition at 2 (quoting Piper's Memorandum at 8). In advancing that complaint, Norkin ignores his own decision to file his personal bankruptcy case in Connecticut in 1997, his allegation that Piper represented him in connection with litigation in his bankruptcy case in Connecticut before the transfer of Britestarr's case to Connecticut, and Piper's explanation of why this case involves many of the same issues as Britestarr's Connecticut case.

Those common issues, which Norkin ignores, include whether ABB ever made any settlement offer at all; whether ABB had the financial ability to fulfill its obligations under such an offer; whether Norkin's personal bankruptcy counsel advised him of an ABB offer (even if Piper did not); whether Norkin would have accepted any offer from ABB; whether Piper had a sound basis to recommend that Britestarr file for bankruptcy and that Norkin, a convicted felon, resign in favor of a Chapter 11 trustee; and whether Piper had a conflict of interest. Because these and other related issues are and have been pending before the district court in Connecticut, it is incorrect to assert that the New York is or ever was the focus of Norkin's case.[4]

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[3] See http://www.ersys.com/usa/36/3651000/distance.htm, a travel distance table that lists all cities with populations over 50,000 that are within 350 miles of New York.

In arguing against transfer to Connecticut, Norkin seems to dispute that his Connecticut bankruptcy attorney, Matthew Beatman, will be an important witness in this case.[5] In the Britestarr case, however, Mr. Beatman has already testified that he attended the meeting at which ABB supposedly made the settlement offer that Piper allegedly failed to convey to Norkin. Declaration of Kevin F. Arthur, Exhibit 1, pp. 180-83. Thus, in this case, Mr. Beatman will be an important witness on the questions of whether ABB actually ever made any such offer; whether he informed his client, Norkin, of the offer (even if Piper did not); and whether Norkin was willing to accept any such offer. The testimony of Mr. Beatman – a Connecticut lawyer who represented a Connecticut debtor in a Connecticut bankruptcy case – confirms that the case belongs in Connecticut.[6]

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[4] It is equally incorrect to say (Opposition at 3) that "defendant has not identified any legal or factual issues which are common to the two cases which would give the Connecticut court an advantage over this court in handling this case." As shown above, Piper has identified a large set of issues that are common to both cases.

[5] Although Norkin's opposition contains a number of unsworn assertions, he complains (at 2) that "[n]o person with knowledge of the facts" has submitted an affidavit asserting that Mr. Beatman or other likely witnesses reside in Connecticut. To the extent that his complaint has any validity, Piper has addressed it in the Declaration of Kevin F. Arthur, which accompanies this reply.

[6] At p. 2, the opposition recounts Norkin's unsworn assertion that he "has no recollection" of Mr. Beatman's attendance at any "meetings at which alternatives to bankruptcy was [sic] discussed." If, as it appears, Mr. Norkin claims to have personal knowledge of those meetings, it is unclear how Piper could have breached its alleged duties to him by failing to fully

Norkin complains (at 4) that Piper has not explained how his claims are inconsistent with Britestarr's. He evidently fails to have noted Piper's explanation (at p. 11 of its Memorandum) that although both cases involve much of the same conduct, Britestarr complains that Piper favored Norkin, while Norkin claims that Piper disfavored him. Piper should not be whipsawed by the possibility of inconsistent adjudications in these two, related cases, which are being financed by the same litigation entrepreneur – Britestarr's Connecticut counsel.

Finally, Norkin terms it "ironic" that Piper argues that this case should be transferred to Connecticut given that Piper opposed the transfer of Britestarr's bankruptcy case to Connecticut on behalf of its client Britestarr, in accordance with the strategy dictated by Britestarr's president, Norkin. Norkin, however, does not explain how Piper can be restricted in its defense by positions that it took as an advocate on its client's behalf. In any event, Norkin neglects to mention that the bankruptcy court rejected Britestarr's argument under Bankruptcy Rule 1014(a), which permitted the court to transfer the case to Connecticut because Norkin's related bankruptcy case was already pending there.

In summary, this case belongs in Connecticut, where Norkin's bankruptcy case has been pending since 1997, where Britestarr's bankruptcy case is currently pending, and where Britestarr's closely-related litigation against Piper is pending as well. The Court, accordingly, should grant Piper's motion and transfer the case to the United States District Court for the District of Connecticut in Bridgeport.

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inform him of those "alternatives."

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